IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 885 OF 2004

Shri Abdulla Abdul Majeed Ansari ... Appellant (Ori.Plaintiff)

V/s

Shri Abdul Hamid Khan ... Respondent

Mr. Amol P. Mhatre for the appellant.

None for the respondent.

CORAM: P.V. KAKADE, J.

DATED: 11TH JULY, 2005

P.C.:

1. This is an appeal filed by the appellant against the judgment and order passed by the Addl. District Judge, Thane dated 20.2.2004 allowing the appeal and setting aside the order passed by the Civil Judge, Jr.Divn., Bhiwandi, decreeing the suit for declaration and possession of encroached portion of the suit property.

2. I have heard the learned counsel for the appellant. Perused the record.

3. The plaintiff filed the suit for declaration and

injunction. Initially, the suit was only for perpetual injunction, however, during the pendency of the suit, plaintiff amended the plaint and also asked for possession of alleged encroached area of suit property from the defendant.

The learned Trial Judge, after hearing both parties and on the basis of available evidence, came to the conclusion that the plaintiff had proved that the defendant had encroached upon his property to the extent of 15 sq.yards and, as such, decreed the suit for removal of the said encroachment and handing over possession of the said area to the plaintiff.

The appeal was carried to the District Court, Thane. The learned Addl. District Judge, after hearing both parties and on the basis of available evidence on record, came to the conclusion that the Trial Judge has erred in finding that the encroachment by the defendant was proved of the suit property and, as such, the appeal came to be dismissed. Hence the present appeal.

4. At the outset, it must be noted that there is no dispute about the fact that the plaintiff and defendant are owners of part of land Survey No.27 Hissa No.5 from

which, admittedly, the plaintiff purchased 100 sq.yard of land and, therefore, defendant is also owner of same land which is immediately adjacent to the plaintiff's land. Plaintiff produced the sale deed as well as 7 x 12 extract on record. It appears that the Trial Court was much influenced from the decision in the earlier suit of the year 1992 in order to come to the conclusion that the defendant had made encroachment over the suit property of the plaintiff. However, defendant's evidence has shown that he has produced the Grampanchayat permission on record which was of the year 1985 and renewed in the year 1989. It also showed that the defendant was permitted to carry out construction in the area admeasuring 70 x 50 sq.ft., which he did. The plaintiff also produced some maps on record to prove that defendant had encroached upon the land. However, the evidence of both maps was not satisfactory. So far as the Court Commissioner's map is concerned, the lower appellate Court has concluded that the evidence of the said map and report of the Court Commissioner with his testimony cannot be relied upon because the Court Commissioner has admitted in his testimony that it was the plaintiff who showed the alleged encroachment and he noted it as per the plaintiff's version. It was also found that the surveyor had not followed necessary

procedure and not issued notices to the concerned parties. Perusal of the judgment of the lower appellate Court shows that he has taken all the evidential aspects into account in order to come to the conclusion that the encroachment was not permissible and perverse findings were recorded, however, I propose to disagree with these proposition and, therefore, the apprehension of the findings by the Addl. District Judge appears to be proper and reasonable and, therefore, no interference is called for and, therefore, the appeal deserves to be dismissed.

In the result, the appeal stands dismissed with no order as to costs.